RECENT DECISIONS.

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AGENCY—RATIFICATION—IMPUTATION OF KNOWLEDGE.—The plaintiff sued for breach of an alleged agreement by the defendant to replace all fruit trees sold to the plaintiff, which should die within five years. The defendant contended that the agreement was not within his agent's authority. *Held,* the defendant ratified the sale with all its terms by receiving the proceeds, and proof of his knowledge of all the facts was unnecessary. *Moyers* v. *Fogarty* (Ia. 1909) 119 N. W. 159.

Ratification must be of the whole contract, *Eberts* v. *Selover* (1880) 44 Mich. 519, 522, but the general rule is that it must be made with knowledge of all the material facts. *Combs* v. *Scott* (Mass. 1866) 12 Allen 493, 496. An exception is said to be made in the case of an agent who has exceeded his prior authority, on the ground that the agent's knowledge is imputed to the principal, Huffcut, Agency (2nd Ed.) 51, but the cases cited do not seem to sustain the proposition. *Meehan* v. *Forrester* (1873) 52 N. Y. 277, 280; *Hyatt* v. *Clark* (1890) 118 N. Y. 563. The doctrine of imputations is based either upon the legal identity of principal and agent or upon the presumption that the agent has fulfilled his duty to disclose all the facts to the principal. 8 COLUMBIA LAW REVIEW 582. This rule is conceded to operate with respect to all facts within the scope of the agent's authority, *Trenton* v. *Pothen* (1891) 46 Minn. 298, 300, but it would seem inapplicable to the present case where the agency is sought to be established by proof of ratification. The better rule, it is submitted, is that the mere receipt by a principal of the benefits of a contract does not work a ratification of a collateral agreement of which he is ignorant. *Smith* v. *Tracy* (1867) 36 N. Y. 79, 84, 86. The result reached in the principal case, while supported by the language of *Lull* v. *Anamosa Nat'l Bank* (1900) 110 Ia. 537, 542, seems due to a failure to distinguish between fraud or misrepresentation within the scope of the agent's authority and the making of a contract in excess of authority.

CONFLICT OF LAWS—LEX FORI IN PROCEEDINGS UNDER IMMIGRATION ACT—LAW DETERMINING AGE OF MAJORITY.—A native of Sweden, being ordered, by the Assistant Secretary of Commerce and Labor, to be deported, under U. S. Comp. St. Supp. 1907, Tit. 29, §§ 20, 21, upon evidence taken before an immigration inspector (§ 24) in Minnesota, on her return there after a visit abroad, claimed, on habeas corpus, to fall outside the Immigration Act, in that she had acquired a domicile in this country by residence in St. Paul between the ages of sixteen and twenty-one. A Minnesota statute fixes the age of majority for females at eighteen. *Held,* the time at which petitioner became an adult, and therefore capable of acquiring the domicile claimed, must be determined by the common law. *Ex parte* Pettersen (1908) 166 Fed. 536.

For reasons of business convenience, *lex loci contractus,* according to the better view, governs the legal force of a minor's commercial contracts. *Male* v. *Roberts* (1800) 3 Esp. 163; *Huey's* Appeal (Pa. 1854) 1 Gr. Cas. 51; Minor, Confl. L. 148. But whether, irrespective of contractual disabilities attending it, minority in fact continues, should, as a pure question of *status,* be determined by *lex domicilii. Woodward* v. *Woodward* (1889) 87 Tenn. 644; and see *Ross* v. *Ross* (1880) 129 Mass. 243, 246. To apply the Minnesota statute directly, in the principal case, as *lex domicilii,* would, of course, "beg the question;" the proper law applicable, therefore, is that of Sweden. *Hiestand* v. *Kuns* (Ind. 1847) 8 Blackf. 346. No proof of the Swedish law, however, seems to have been offered; accordingly, since the common law cannot be presumed to exist in Sweden, recourse must be had to *lex fori.* 8 COLUMBIA LAW REVIEW 50. But what is *lex fori* in these

deportation proceedings? The order issued from Washington on evidence taken in Minneapolis; so the "forum" may perhaps be regarded as in either place. If it be in Minneapolis, the Minnesota statute might flow in as *lex fori;* if in Washington,—the law of the District of Columbia, which, on this point, appears to be the common law rule, unchanged by statute. See Code, Dist. Col. § 1156. Or again, it might be urged, this immigration tribunal must, like the Court of Claims, from necessity, apply the "general common law," *Moore* v. *U. S.* (1875) 91 U. S. 270, irrespective of its situs. Any of these theories would admit the principles of Conflict of Laws as part of *lex fori* in the first instance; but only the last two sustain the final result.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—COMPENSATION FOR THE TAKING OF PROPERTY.—A State constitution required railroads to transfer freight to a connecting carrier at any point where there was a physical connection between the two companies. By virtue of this constitutional provision a railroad was ordered to deliver its cars to a connecting carrier. *Held,* three justices dissenting, the defendant was deprived of its property without due process of law. *Louisville & N. R. R. Co* v. *Central Stockyards Co.* (1909) 29 Sup. Ct. Rep. 246.

Under the police power the use of property may be so regulated that the owner must incur expense. *Atlantic Coast Line* v. *No. Car. Corp. Comm.* (1907) 206 U. S. 1; *Chicago, Burl. etc. R. R.* v. *Chic.* (1897) 166 U. S. 266. If, however, even though the title is untouched, a substantial interest is taken for another purpose, it is not considered a regulation but an appropriation for which compensation must be given. *State* v. *Chicago, Mil. etc. Ry.* (1887) 36 Minn. 402. In the principal case there was more than a restraint in the enjoyment of property since the railroad would have been deprived temporarily of possession and the connecting carrier have absolute control of its cars. The decision may be supported upon the theory that due process requires not only that compensation be given, but also that a proper method be provided for ascertaining the amount and securing its payment without risk or delay. *Conn. R. R. Co.* v. *Conn.* (1879) 127 Mass. 50; *Hickman* v. *City of Kansas* (1894) 120 Mo. 110. The defendant was protected only by a common law action for damages which is often attended by both delay in procedure and risk in ultimate collection. Cooley, Const. Lim. 1815; cf. *Ash* v. *Cummings* (1872) 50 N. H. 591. The opinion of the majority that the provision in the State constitution was an exercise of the power of eminent domain is scarcely reconcilable with *Head* v. *Amoskeag* (1885) 113 U. S. 9, which upheld the Mill Act as a valid exercise of the police power. That case, though severely criticised, Lewis, Em. Dom. 182, 183, is explainable in its results because of the great antiquity of the Mill Acts, and the general acquiescence in their constitutionality. *Otis Co.* v. *Ludlow Co.* (1906) 201 U. S. 140.

CONSTITUTIONAL LAW—STATUTES—RIGHT TO QUESTION CONSTITUTIONALITY.—Ch. 93, Neb. Laws of 1901, declared that persons committing specified aggressions against "any citizen or resident of the state of Nebraska" should be deemed guilty of blackmail. The defendant, appealing from a conviction for blackmailing citizens of Nebraska, alleged that the statute was unconstitutional as denying equal protection to persons other than citizens or residents within the limits of the state. *Held,* though the grounds of unconstitionality did not affect the defendant, nevertheless, since those discriminated against had no way of bringing the question before the court, the defendant might do so; and he was accordingly discharged. *Greene* v. *State* (Neb. 1908) 119 N. W. 6. See Notes, p. 440.

CORPORATIONS—DIRECTORS—SUIT BY STOCKHOLDER.—A stockholder requested the managing officers of a corporation to bring suit to cancel stock issued in pursuance of an alleged fraudulent contract. This they refused to do, though admitting by resolution that the contract was fraudulent. The stockholder brought suit in his own name. *Held,* that the suit would lie. *Shaw* v. *Straight* (Minn. 1909) 119 N. W. 951.

Wrongs in corporate dealings ordinarily affect the stockholder only through the corporation itself and should be redressed at its suit. But equity will entertain the suit of an individual stockholder when the corporation will not sue at his demand, or, when circumstances are such that his demand would obviously be futile, *Dunphy* v. *Traveler Newspaper Ass'n.* (1888) 146 Mass. 495, as, for example, where the wrongdoers hold or control a majority of the shares; *Burland* v. *Earle* L. R. [1902] A. C. 83; or where the directors themselves are the wrongdoers; *Jacobson* v. *Brooklyn Lumber Co.* (1906) 184 N. Y. 152; or where the emergency is so great as not to admit of delay. *Starr* v. *Shephard* (1906) 145 Mich. 302. A refusal by the governing body to bring suit, although it is not privy to the original wrong, may be in such wanton disregard of the interests of the corporation as to practically connect its members with it, and entitle the shareholder to sue, *Hanna* v. *Lyon* (1904) 179 N. Y. 107, but such refusal must be more than a mere error in judgment and in itself a breach of trust. *McCloskey* v. *Snowden* (1905) 212 Pa. 249. Some courts hold that when time permits the stockholder must also show that he has unsuccessfully appealed to the general body of stockholders. *Kessler* v. *Ensley* (1903) 123 Fed. 546. The question must largely depend upon the circumstances of each case. *Brewer* v. *Boston Theater* (1870) 104 Mass. 378. Equity entertains this class of suits that the stockholder may secure justice and to comply with so onerous a precedent requirement is more often impracticable than not, Cf. *Schoening* v. *Schwenck* (1901) 112 Ia. 733, and it often not required. *Green* v. *Hedenberg* (1896) 159 Ill. 489; *Knoop* v. *Bohmrich* (1891) 49 N. J. Eq. 82; *Williams* v. *Erie Mountain Consol.*, etc., *Mining Co.* (1907) 47 Wash. 360. The principal case is in accord with the weight of authority.

CORPORATIONS—RESERVED POWER—VESTED RIGHTS.—Action by minority shareholder to restrain defendant corporation from putting in effect an amended charter, adopted under authority of a statute authorizing the enfranchisement of policy holders, which provided that policy holders should elect twenty-eight and shareholders twenty-four of the directors of the company. *Held,* as the original charter authorized the directors to enfranchise policy holders having insurance to the amount of at least $5,000, the statute does not substantially change the character of the company and is within the reserved power. But the amendment adopted under the statute, as it not only enfranchises policyholders, but disfranchises shareholders, cannot be sustained. *Lord* v. *Equitable Life Assur. Soc.* (1909) 87 N. E. 443. See Notes p. 427.

CORPORATIONS—TRANSFER OF STOCK—SUIT BY TRANSFEREE.—The plaintiff purchased from a previous holder a number of shares of the stock of a small bank. By statute transfers of stock were not valid until registered on the books of the corporation. Registration was refused and the plaintiff brought suit in equity to enforce it. *Held,* that there being no adequate remedy at law the decree would issue. *Madison Bank* v. *Price* (Kan. 1909) 100 Pac. 280.

Although the cases are in confusion as to the nature of the transferee's interest before registration, 9 COLUMBIA LAW REVIEW 433, it seems that if registration be improperly refused by the corporation the transferee will be clothed with the rights and liabilities of a stockholder. *Plymouth Bank* v. *Bank of Norfolk* (Mass. 1830) 10 Pick. 454; *Whitney* v. *Butler* (1886) 118 U. S. 655; *Richmond* v. *Irons* (1887) 121 U. S. 27, 59. For the corporation's wrongful refusal to register his stock the transferee may recover damages in *assumpsit, Commercial Bank* v. *Kortright* (N. Y. 1839) 22 Wend. 348, case, *Protection Life Ins. Co.* v. *Osgood* (1879) 93 Ill. 69, or conversion. *Ralston* v. *Bank of Cal.* (1896) 112 Cal. 208. Mandamus is an extraordinary remedy to be invoked only in cases of public concern, *Shipley* v. *Mechanics Bank* (N. Y. 1813) 10 Johns. 484; *Towne* v. *Nichols* (1882) 73 Me. 515. It has been granted when registration was refused by railroad and turnpike companies on the ground that they performed public functions,

State v. *McIver* (1870) 2 S. C. 25; *G. M. & S. I. Turnpike Co.* v. *Bulla* (1873) 45 Ind. 1, but this reasoning is not sound since these controversies involve merely a private right. *Stackpole* v. *Seymour* (1879) 127 Mass. 104. The weight of authority rejects mandamus as a remedy when any other is possible. *Murray* v. *Stevens* (1872) 110 Mass. 95; *Freon* v. *Hakes* (1886) 54 Conn. 274. But see *Harr* v. *Burnell* (1900) 106 Fed. 280. An action for damages is clearly inadequate when, as in the principal case, the stock is not procurable in the market, *Cushman* v. *Thayer Mfg. Co.* (1879) 76 N. Y. 315, and in any case to hold damages adequate would, in effect, force the plaintiff to sell that which he has. An equity decree may rightly issue to compel the corporation to perform a ministerial act, it is in duty bound to do. *Westminster National Bank* v. *N. E. Electrical Co.* (1906) 73 N. H. 465.

CORPORATIONS—UNREGISTERED TRANSFER OF STOCK—RIGHTS OF ATTACHING CREDITOR.—A stockholder in a corporation sold his stock to the plaintiff by delivery of the certificate with power of attorney. A by-law of the corporation provided that the stock should be transferable only on the books. In a suit by the transferee to compel the corporation to make the transfer on its books, the defendant set up a subsequent attachment of the stock by a creditor of the transferror. *Held,* the plaintiff acquired a better right to the stock than the attaching creditor, and the corporation must make the transfer accordingly. *Reilly* v. *Absecon Land Co.* (N. J. 1908) 71 Atl. 248. See Notes, p. 433.

COURTS—COURTS MARTIAL—WRIT OF PROHIBITION.—Relator applied to a civil court for a writ of prohibition to enjoin a court martial. *Held,* a court martial was not an inferior court within the meaning of § 86 of the State Constitution, and the writ was denied. *State* v. *Nuchols* (N. D. 1909) 119 N. W. 632.

Courts martial are judicial tribunals. *People* v. *Van Allen* (1873) 55 N. Y. 31. However, their proceedings are not reviewable in the civil courts, *Wales* v. *Whitney* (1885) 114 U. S. 564; their organization having been independent of the judiciary. *Dynes* v. *Hoover* (1857) 20 How. 65. Further, not being inferior courts of the judiciary, they cannot, it would seem, though about to proceed without jurisdiction, be controlled by writ of prohibition. *Smith* v. *Whitney* (D. C. 1885) 4 Mackey 535; *U. S.* v. *Maney* (1894) 61 Fed. 140. The contrary is held in England, where courts martial are subject to writs of prohibition from civil courts. *Grant* v. *Gould* (1792) 2 H. Black. 69 at 100; and see *Washburn* v. *Phillips* (Mass. 1841) 2 Metc. 296. If the military courts have been given jurisdiction over the person or property of civilians, their proceedings are subject to review by the courts. *Grove* v. *Nott* (1884) 46 N. J. L. 328; *State* v. *Davis* (N. J. 1816) 1 South 311. However, if a court martial exceeds, or proceeds without, its jurisdiction, the person aggrieved may escape its sentence by raising the jurisdictional question collaterally to a petition for a writ of habeas corpus, or to a civil suit. *In re Esmond* (D. C. 1886) 5 Mackey 64; *Smith* v. *Whitney* (D. C.) supra. The denial, in the principal case, of the writ of prohibition was correct.

DAMAGES—CONTRACT FOR THE SALE OF REALTY—FAILURE TO MAKE TITLE.—A vendor in an executory contract for the sale of realty failed to make title. The vendee sued for damages. *Held,* the measure of damages was the consideration paid, with interest, and any special damage alleged and proved but not the loss of the bargain. *Clifton* v. *Charles* (Tex. 1909) 116 S. W. 120. See Notes, p. 438.

DOMESTIC RELATIONS—DESERTION—RIGHT OF WIFE TO SUE AS A FEME SOLE. —A deserted wife had heard nothing of her husband for four years. She brought suit in her own name for personal injuries. *Held,* the husband did not have to be joined as party plaintiff. *Missouri, etc., Co.* v. *Allen* (Tex. 1909) 115 S. W. 1179.

While, generally, at common law a married woman could not sue alone,

the husband's banishment, *Countess of Portland* v. *Prodgers* (1689) 2 Vern. 104, or desertion which included the abjuring of the realm, 1 Bishop, Mar., Div. & Sep., 1324; *Baggett* v. *Frier* (1809) 11 East 361, entitled her to bring suit as a *feme sole.* His absence from the realm was insufficient unless he were an alien. *Gregory* v. *Paul* (1818) 15 Mass. 31. In this country, desertion followed by departure from the state without intention of returning, removes the wife's disability to sue. *Smith* v. *Silence* (1856) 4 Ia. 321; *Gregory* v. *Pierce* (Mass. 1842) 4 Met. 478. Even when the husband is within the realm a deserted wife may use his name to sue on indemnifying him against costs, this privilege being accorded her not only to protect her separate property, *Chambers* v. *Donaldson* (1808) 9 East 471; *Morgan* v. *Thomas* (1834) 2 Crom. & N. 388; *Merritt* v. *Doss* (1856) 31 Miss. 275, but also to redress her personal injuries. *Harrison* v. *Almond* (1835) 4 Dow. P. C. 321; *Binger* v. *Belsley* (1867) 45 Ill. 72. Under the same circumstances some courts have gone further and allowed the wife to sue in her own name to protect her separate property. *Benadum* v. *Pratt* (1853) 1 Oh. St. 403; *Love* v. *Moynesan* (1854) 16 Ill. 277. Logically, even in the absence of legislation, *cf. Lamb* v. *Harbaugh* (1895) 105 Cal. 680, there would seem to be no reason to deny her the same privilege to redress her personal wrongs, especially, where, as in the principal case, it does not appear whether the husband was within or without the state. *Ry. etc. Co.* v. *Griffith* (1896) 12 Tex. Civ. App. 631.

EVIDENCE—PERSONAL TRANSACTIONS WITH A DECEDENT.—The plaintiff sued to cancel a lost deed. The only evidence of its execution and delivery was the fact that it had been recorded by the deceased husband of the defendant. *Held,* under the Alabama Code (1907) § 4007, prohibiting an interested party from testifying to a personal transaction with a decedent, the plaintiff's testimony denying the execution of the deed was admissible. *Blount* v. *Blount* (Ala. 1909) 48 So. 581.

The court reaches its result on the ground that a denial of a personal transaction, which has not been sufficiently proved by the other party, is not within the prohibition of the statute. A rule which makes the competency of testimony depend on the weight of evidence adduced in contradiction thereof is of doubtful validity. It is generally held, under like statutes, that the denial of a personal transaction by an interested party is as obnoxious as its affirmation, irrespective of the amount of evidence introduced to prove the transaction. *Parks* v. *Andrews* (N. Y. 1890) 56 Hun. 391; *Angel* v. *Angel* (1900) 127 N. C. 451; *contra, Murphy* v. *Hindman* (1897) 58 Kan. 184. Nor is an interested party allowed to testify to extraneous facts which create the natural inference of the existence or non-existence of a personal transaction, *Richardson* v. *Emmett* (1902) 170 N. Y. 412; *Angel* v. *Angel, supra.;* see *Miller* v. *Cannon* (1887) 84 Ala. 59, and hence the fact that the plaintiff in the principal case is denying the execution of the deed, and not its delivery, which is the personal transaction involved, ought not to alter the result. In New York, however, evidence which indirectly tends to affirm or negative a transaction may be introduced for the purpose of contradicting an adverse witness, but not for the purpose of establishing an affirmative cause of action or defense. *Pinney* v. *Orth* (1882) 88 N. Y. 447; *Lewis* v. *Merritt* (1885) 98 N. Y. 206; *Clift* v. *Moses* (1889) 112 N. Y. 426. But the evidence in the principal case was offered for the purpose, not of contradicting an adverse witness, but simply of rebutting the presumption of due execution arising from the record—i. e. it was introduced to establish an affirmative cause of action. The dissenting opinion seems preferable.

EVIDENCE—PRESUMPTIONS—THE PRESUMPTION OF LIFE.—Intestate died May 1, 1891. His son C disappeared in 1883 and his fate or whereabouts remained unknown to the time of the trial (Jan. 1909). *Held,* C must have been presumed to have lived through the seven years following his disappearance; and that the presumption of death matured "only after another period of seven years, which in this instance ended in 1897. The son was

therefore presumably alive at his father's death." *Freeman's Estate* (Pa. 1909) Leg. Int. March 19, 1909. See Notes, p. 435.

HIGHWAYS—PUBLIC AND PRIVATE USES—INDIRECT TRESPASS—DEROGATION FROM GRANT.—The defendant, pursuing a private enterprise, constructed a vault beneath the sidewalk, under a license issued by legislative authority. As an "inevitable result" of the construction it jarred the earth and injured the pipes of the plaintiff, laid in the street by virtue of a franchise. *Held,* the defendant, though not negligent, was liable in damages. *New York Steam Co.* v. *The Foundation Co.* 1908) 40 N. Y. L. Jour., No. 146.

If the plaintiff and defendant had been adjacent private property owners, the defendant would not have been liable for the injury, for in the absence of negligence, indirect injury to another's land in the reasonable use of one's own land is *damnum absque injuria. Holland House Co.* v. *Baird* (1901) 169 N. Y. 136; *Booth* v. *The Rome etc. R. R. Co.* (1893) 140 N. Y. 267. In the principal case, however, both parties operating in the street, the defendant was held liable on the theory that the city cannot derogate from its grant, *Grosvenor Hotel Co.* v. *Hamilton* (1894) 63 L. J. Q. B. 661; *Caledonian Ry. Co.* v. *Sprot* (1856) 2 Macq. 449; Gale, Easements, 98; Goddard, Easements 135, which includes the right of subjacent support. *Normanton Gas Co.* v. *Pope & Pearson* (1883) 52 L. J. Q. B. 629. But in public grants of this sort the grantee takes nothing by implication, *W. U. Tel. Co.* v. *Syracuse El. & P. Co.* (1904) 178 N. Y., 325, and the city impliedly reserves the right to use the street for public purposes though in conflict with the grantee's privileges. *Syracuse Water Co.* v. *City of Syracuse* (1889) 116 N. Y. 157. Accordingly the decree in the principal case must rest alone on the fact that the defendant was furthering a private enterprise. However, even though the defendant is a private corporation, since prior to the grant of the plaintiff's franchise there was a statute authorizing the defendant's license, Greater N. Y. Charter (Laws of 1901, Chap. 466) Sec. 49, Sub. 7, there might be some foundation for implying a reservation permitting a reasonable use of the license.

HIGHWAYS VACATION OF STREETS—PRIVATE EASEMENTS—CONSTITUTIONALITY OF CHAPTER 1006 LAWS OF 1895, NEW YORK.—Land was conveyed bounded upon a street which had been vacated. The grantor owned part of the street-bed adjoining the lot. *Held,* private easements of access, light and air over the highway, extinguished, under a statute, by the vacation, were not re-created by the conveyance. *Swain* v. *Shonlaben,* (1909) 40 N. Y. L. J., No. 143. See Notes, p. 442.

INSURANCE—INSURABLE INTEREST OF A CREDITOR IN THE LIFE OF ITS DEBTOR.—The defendant took out an insurance policy of $2,500 on the life of his half uncle, who was indebted to the defendant in the sum of $400. *Held,* the defendant as creditor was only entitled to retain out of the proceeds of the policy an amount equal to the debt plus the premiums paid, the personal representative of the detor being entitled to the balance. *Deal* v. *Hainley* (Mo. 1909) 116 S. W. 1.

Although the authorities are agreed that a creditor has an insurable interest in the life of his debtor, *Ins. Co.* v. *Luchs* (1883) 108 U. S. 498, there is considerable conflict as to the nature and extent of such interest. A few jurisdictions, considering such insurance to be purely indemnity, *Strode* v. *Drug Co.* (1903) 101 Mo. App. 627, though not limiting the face of the policy to the amount of the debt, *Ins. Co.* v. *Hazlewood* (1889) 75 Tex. 338, apply the rule, as in the principal case, to the division of the proceeds. *Exchange Bank* v. *Loh* (1898) 104 Ga. 446; *Goldbaum* v. *Blum* (1891) 79 Tex. 338. Most jurisdictions, however, hold that the creditor is entitled absolutely to such insurance taken out in any amount not so disproportionate to the debt as to indicate bad

faith and to stamp the policy as a wager. *Amick* v. *Butler* (1887) 111 Ind. 578; *Ferguson* v. *Massachusetts Mutual Life Ins. Co.* (N. Y. 1884) 32 Hun. 306; and see *Ulrich* v. *Reinoehl* (1891) 143 Penn. 238. This latter view appears preferable both on principle and in practice. Life insurance is not indemnity insurance, *Rawls* v. *Ins. Co.* (1863) 27 N. Y. 283; *Ins. Co.* v. *Allen* (1884) 138 Mass. 24, and since public policy is amply protected against mere gambling insurance by the requirement of good faith, the former view introduces a needless and inconvenient exception to the general doctrine. And, as the creditor assumes the risk and bears the burden of carrying the policy, it would appear only just that he be entitled to the entire proceeds rather than the estate of the deceased, who was not a party to the contract and bore none of its burdens. *Ritter* v. *Smith* (1889) 70 Md. 261.

INSURANCE—PAROL WAIVER—POLICY REQUIRING WRITTEN WAIVER.—Plaintiff, holding an insurance policy, void if additional insurance be procured without the written consent of the insurer, procured further insurance relying on oral consent. *Held,* the oral consent was sufficient. *N. W. Ins. Co.* v. *Avant* (Ky. 1909) 116 S. W. 274.

Where a policy requires waivers to be in writing signed by specified agents, some jurisdictions hold that this limits the authority of all other agents, making their oral waiver ineffective. *O'Brien* v. *Ins. Co.* (1892) 134 N. Y. 28. A similar view has been reached, on grounds of agency, where there is a stipulation that no agent may waive by parol. *Egan* v. *Ins. Co.* (1895) 28 Ore. 289. But most jurisdictions hold, in both instances, that such provisions may themselves be waived by any general agent. 3 Cooley, Insurance, 2607. Where the provision is simply that waivers must be in writing, it is not generally regarded that this limits the scope of the agent's authority and an oral waiver is allowed, *Ins. Co.* v. *Humphrey* (1896) 62 Ark. 348, some cases proceeding on the ground that the provision for a writing is nugatory. *Lamberton* v. *Ins. Co.* (1888) 39 Minn. 129. Public policy is controlling in these decisions, but the opposite holding that such a stipulation is valid, and a waiver to be effective must comply therewith, seems sound on theory. *Gladding* v. *Ins. Ass'n* (1884) 66 Cal. 6; *Smith* v. *Ins. Co.* (1888) 60 Vt. 682. Where, as in the principal case, there is merely a condition providing for written consent to additional insurance without limitation on the power to waive, there is greater unanimity in holding that the condition may be orally waived after a breach. *Ins. Co.* v. *Armstrong* (1893) 145 Ill. 469; *Kyte* v. *Ins. Co.* (1887) 144 Mass. 43, *contra.* A similar conclusion follows where additional insurance is secured in reliance on prior oral consent. *Carrugi* v. *Ins. Co.* (1869) 40 Ga. 135; *Ins. Co.* v. *Gray* (1890) 43 Kan. 497; *Ins. Co.* v. *Earle* (1876) 33 Mich. 143. The principal case arrives at a result in accord with the weight of authority.

INTERSTATE COMMERCE—WILSON ACT—LIQUOR ADVERTISEMENTS.—Me. Rev. St. 1903, c. 29, § 45, forbids the publication within the state of advertisements of intoxicating liquors sold or kept for sale without the state. *Held,* under the Wilson Act, the law is a valid exercise of the police power. *State* v. *J. P. Bass Pub. Co.* (Me. 1908) 71 Atl. 894.

Decisions upholding the right, under the Commerce Clause of sending intoxicating liquors into another state, and there selling them in the original package, *Bowman* v. *Chicago etc. Ry. Co.* (1888) 125 U. S. 465; *Leisy* v. *Hardin* (1890) 135 U. S. 100, were followed by the Wilson Act of 1890, 26 Stat. L. 313, sustained in *In re Rahrer* (1891) 140 U. S. 545, subjecting such liquors to the police power of the state "on arrival" therein. Under this law, a state, tho' it cannot prevent delivery to the consignee, *Heyman* v. *Southern Ry. Co.* (1906) 203 U. S. 270, may forbid the sale of intoxicating liquors even in the original package. *Scott* v. *Donald* (1897) 165 U. S. 58; *Rhodes* v. *Iowa* (1898) 170 U. S. 412. And as an incident of such sale, a state may regulate solicitation by "drummers." *Delameter* v. *South Dakota*

(1907) 205 U. S. 93. Advertising, as one form of solicitation, would seem to be equally subject to state regulation. It is true that, even under the Wilson Act, the police power does not cover intoxicants received from another state for the personal use of the consignee. *Vance* v. *Vandercook, No. 1* (1898) 170 U. S. 438; *Pabst Brewing Co.* v. *Crenshaw* (1905) 198 U. S. 17. But it does not follow from the state's lack of power in this respect, as has been argued, see 20 Harvard Law Review 577, that it cannot prevent solicitation within its bounds for such a purpose, there being a clear distinction between the case of a person entering into a contract in his own behalf, *Allgeyer* v. *Louisiana* (1897) 165 U. S. 578, and that of a person soliciting contracts in behalf of others. *Nutting* v. *Massachusetts* (1902) 183 U. S. 553. In the latter instance, the business of solicitation is completely subject to the police power of the state. *Delameter* v. *South Dakota, supra.* The decision in the principal case, sustaining the right of the state to prohibit the business of soliciting, through advertisements, the sale of intoxicants, whether for personal consumption or not, would therefore seem correct both on principle and authority.

LANDLORD AND TENANT—ADVERSE POSSESSION.—A lessee of premises deeded them in fee to the defendant, who was subsequently sued in ejectment. *Held,* the occupation of the lessee's grantee was, under a local statute, adverse to the lessor and his successors in title. *Illinois Steel Co.* v. *Budsisz* (Wis. 1909) 119 N. W. 935.

The rule that a tenant is estopped to deny his landlord's title did not prevail at earlier common law in the case of unsealed leases, but was an outgrowth of the action for use and occupation. *Verman* v. *Smith* (1857) 15 N. Y. 327; Bigelow, Estoppel (3rd ed.) 390-393. Under this rule the tenant can not hold adversely, even though he is in possession upon the establishment of the relation, *Carter* v. *Marshall* (1874) 72 Ill. 609; *Hawes* v. *Shaw* (1868) 100 Mass. 187, and see *Encarnacion* v. *Ginochio* (1874) 47 Cal. 459, or where he holds over after the term. *Shelton* v. *Doe d. Esteana* (1844) 6 Ala. 230; *Whaley* v. *Whaley* (S. C. 1834) 1 Spears L. R. 210. However, upon a surrender of the premises, *Davis* v. *Williams* (1900) 130 Ala. 530, or in more liberal jurisdictions upon a repudiation of the tenancy brought home to the landlord, *Swan* v. *Young* (1892) 36 W. Va. 57; *Emerick* v. *Taverner* (Va. 1852) 9 Grat. 220, the tenant may thereafter occupy adversely. This estoppel binding the lessee is effective against all holding through him, as a grantee can take no more than his grantor has, *Jackson* v. *Davis* (N. Y. 1825) 5 Cow. 123, although a tortious feofee seems not to have been subject to this estoppel. Co. Litt. 611a. As the law regards adverse possession in the nature of a penalty to a person sleeping upon his rights, *Emerick* v. *Taverner, supra,* this doctrine is manifestly inapplicable to a landlord whose reliance upon his tenant seemingly is warranted. *Sands* v. *Hughes* (1873) 53 N. Y. 287. A few jurisdictions, however, hold the contrary where the grantee has no knowledge of the tenancy. *Dikeman* v. *Parrish* (1847) 6 Pa. St. 210; *MacDougald* v. *Reedy* (1883) 71 Ga. 750. The strict construction of the statute in the principal case accords with the minority view.

LITERARY PROPERTY—COPYRIGHT OF CONTRIBUTIONS IN A PERIODICAL.—The author of a story in a copyrighted periodical to whom the publisher's rights were reassigned, sued to enjoin an enfringement. *Held,* the story was protected by properly filing a copy of the title of the periodical. *Dam* v. *Kirke La Shelle Co.* (1908) 166 Fed. 589.

The question whether the contributions in a copyrighted periodical are protected without separate copyright has not frequently been considered. Two recent cases in the Circuit Court decided that properly filing the title of the periodical is sufficient. *Ford* v. *Blaney Amusement Co.* (1906) 148 Fed. 642; *Harper Bros.* v. *Donohue & Co.* (1905) 144 Fed. 491. This view is to be supported on three conclusive grounds. (1) The construction of the Copyright Act of 1891, (U. S. Compiled Statutes 1901, 3417, and 3407-8). *Harper Bros.* v. *Donohue & Co., supra* at 497. (2) The

copyright of a book protects its contents even though they consist of independent compositions. *Callaghan* v. *Myers* (1888) 128 U. S. 617; *White* v. *Geroch* (1819) 2 Barn. & Ald. 298; *D'Almaine* v. *Boosey* (1835) 1 Y. & C. Exch. 288. (3) It is the policy of the courts to protect the author by liberal construction of the statute. *Holmes* v. *Donohue* (1896) 77 Fed. 179; *Myers* v. *Callaghan* (1881) 5 Fed. 726. However it has been denied that a newspaper may be copyrighted as an entirety, *Tribune Co.* v. *Associated Press* (1900) 116 Fed. 126 *Clayton* v. *Stone* (1829) Fed. Cas. 2872, because much of its contents is not the subject of copyright. But see *Harper* v. *Shoppell* (1880) 26 Fed. 519 (copyright of an illustrated paper); *Cate* v. *Devon, etc. Newspaper Co.* (1889) 58 L. J. 288 (copyright of newspaper in England). Also in a Supreme Court decision which denied an author the right to copyright a book which had previously appeared in serial form, it was said that he should have copyrighted each instalment as it appeared in the magazine. *Holmes* v. *Hurst* (1899) 174 U. S. 82, 90. If the copyright of the instalment is secured by the publisher's copyrighting the magazine as a whole, instead of by the method just indicated, it is to be noted that under the decision of *Mifflin* v. *White & Co. and Dutton* (1903) 190 U. S. 260, 265, the author must lose the right to copyright the story in book form.

NATURALIZATION—STATUS OF THE WIFE OF A NATURALIZED CITIZEN.—Objection was raised to petitioner's claim for naturalization that such naturalization would enable the wife, who was being detained at Ellis Island as an alien afflicted with trachoma, to evade the immigration law, since the wife of a citizen became herself a citizen. *Held,* though the clause "who might herself be lawfully naturalized" in U. S. R. S. § 1994, prevented the wife being considered a citizen unless she was lawfully within the country, the petition should not be granted. *In re Rustigian* (1908) 165 Fed. 980.

The authorities have been practically uniform in their interpretation of § 1994 in holding that the clause quoted operated to debar from naturalization by marriage only such women as would be excluded by the former provision of the naturalization laws that an applicant must be "a free white person, not an alien enemy." *Kelly* v. *Owen* (1868) 7 Wall. 496; *Leonard* v. *Grant* (1880) 5 Fed. 11; *Kane* v. *McCarthy* (1869) 63 N. C. 299. This interpretation makes the wife of a citizen of the United States, *ipso facto,* a citizen even though she does not come to the United States until after her husband's death, *Hedmen* v. *Rose* (1879) 63 Ga. 458; or though she never comes to this country. *Burton* v. *Burton* (N. Y. 1864) 1 Keyes 359. This view, while open to the possible criticism that it naturalizes non-residents, *Zartarian* v. *Billings* (1906) 204 U. S. 170, is in harmony with the policy pursued by English legislation, *Regina* v. *Manning* (1849) 2 C. & K. 886; and carries out the liberal naturalization program adopted by this country. The interpretation of the court in the principal case would necessarily require of the wife not only residence in the United States, but all the other qualifications ordinarily required for judicial naturalization; and this would practically nullify the entire effect of § 1994. *Halsey* v. *Beer* (N. Y. 1889) 52 Hun, 366. In the principal case, however, the facts raised a strong presumption that the petitioner was not applying for citizenship in good faith, *In re Bodek* (1894) 63 Fed. 813, and the decision of the case was therefore correct.

NEGOTIABLE INSTRUMENTS—ALTERATION—NEGLIGENCE.—A holder in due course sued an accommodation indorser on a note so drawn that the maker was able to increase the amount by the insertion of words and figures. *Held,* the plaintiff could recover only the amount of the note as indorsed by the defendant. *Nat'l Exchange Bank of Albany* v. *Lester* (1909) 40 N. Y. Law Jour. No. 136.

Before the statute, any material alteration of a negotiable instrument

rendered it absolutely void. *Wood* v. *Steele* (1867) 6 Wall. 80, 82. Following *Young* v. *Grote* (1827) 4 Bing. 253, some courts have made an exception in the case where the alteration was facilitated by the form of the instrument, allowing a holder in due course to recover the amount of the instrument as altered, from a maker, *Garrard* v. *Hadden* (1871) 67 Pa. St. 82, a surety, *Hackett* v. *First Nat'l Bank* (1902) 114 Ky. 193, a certifying bank, *Helwege* v. *Hibernia Nat'l Bank* (1876) 28 La. Ann. 520, and an indorser, *Isnard* v. *Torres* (1855) 10 La. Ann. 103, as contended by the plaintiff in the principal case. The exception was put upon the ground that, as between two innocent parties, the loss should fall upon him whose negligence had made the fraud possible. In England, *Young* v. *Grote* has been variously interpreted, *Guardians of Halifax Union* v. *Wheelwright* (1875) L. R. 10 Exch. 183, 192; *Swan* v. *North British etc. Co.* (1863) 2 H. & C. 175, 189; *Robarts* v. *Tucker* (1851) 16 Q. B. 560, 579, and severely criticized, *Scholfield* v. *Earl of Londesborough* (1896) 12 Times L. R. 604, s. c. [1895] 1 Q. B. 536, 542. In this country, the courts usually distinguish it on its facts,—a suit between a banker and a customer whose agent had altered a check, *Knoxville Nat'l Bank* v. *Clark* (1879) 51 Ia. 264, 271; *Greenfield Savings Bank* v. *Stovall* (1877) 123 Mass. 196, 201, 207, and parties to a bill or note are said to owe no duty to subsequent holders to guard against possible forgery. The Negotiable Instruments Law, § 205, provides that the holder in due course of an altered instrument may enforce payment thereof according to its original tenor; but makes no provision for an exception in the case of a badly drawn instrument. The principal case, therefore, seems sound in applying the general rule of the section.

PLEADING AND PRACTICE—REAL PARTY IN INTEREST—PRINCIPAL AND AGENT.—The defendant purchased fertilizer of the plaintiff, an agent. Plaintiff had agreed with his principal that the fertilizer, until paid for, and also all notes and accounts, should belong to the principal. *Held,* that the plaintiff is not the real party in interest, and cannot maintain the action, because any proceeds would go to the principal. *Chapman* v. *McLawhorn* (N. C. 1909) 63 S. E. 721.

Although the codes of the different states declare that the action must be brought by the "real party in interest," by the weight of authority this does not necessarily mean the one who finally will receive the proceeds. Pomeroy, Code Remedies (4th Ed.) § 70. As far as the defendant is concerned, the real party in interest is the one who can effectually release the claim, and against whom any counterclaim or other defences may be successfully pleaded. *Sheridan* v. *Mayor* (1876) 68 N. Y. 34; *Sturgis* v. *Baker* (1903) 43 Ore. 236. For this purpose bare legal title is generally considered sufficient. *Sheridan* v. *Mayor, supra.* On this ground it has been held that the agent of an undisclosed principal can maintain an action on a contract made in his name, *Tutsin Fruit Assn.* v. *Earl Fruit Co.* (Cal. 1898) 53 Pac. 693; and that an agent for a disclosed principal can maintain an action on the contract if it is made in the agent's name. *Fear* v. *Jones* (1858) 6 Ia. 169. A similar case has also been supported in New York on the ground that the agent is the trustee of an express trust. *Considerant* v. *Brisbane* (1860) 22 N. Y. 389. In North Carolina, however, where the principal case was decided, the courts have taken the view that he only can maintain the action who will receive the proceeds, *Abrams* v. *Cureton* (1876) 74 N. C. 523, *Alexander* v. *Wriston* (1879) 81 N. C. 192; and a holder for mere purposes of collection is not the "trustee of an express trust" within the meaning of the Code. *Boykin* v. *Bank* (1896) 118 N. C. 566; *Wynne* v. *Heck* (1885) 92 N. C. 414. The principal case, therefore, is in line with earlier cases in its jurisdiction, but seems squarely against the weight of authority in the other code states.

PUBLIC SERVICE COMPANIES—EJECTMENT.—A life tenant permitted a corporation to build and operate a railroad upon her lands. Upon her death the remainder-man brought suit in ejectment against its successor. *Held*

for the plaintiff with a stay of execution to enable the defendant to purchase or condemn. *Mapes* v. *Vandalia R. R. Co.* (Ill. 1909) 87 N. E. 393.

When land is wrongfully taken by a corporation the fact that it is devoted to a use in the uninterrupted continuation of which the public has an interest will not bar an action of ejectment unless other consideration are present. *R. R. Co.* v. *LeBlanc* (1897) 74 Miss. 650. Thus the action will lie where a city builds a car line upon private lands without the owner's knowledge. *Green* v. *Tacoma* (1892) 51 Fed. 622. In such cases the public interest is protected by stay of execution, *R. R. Co.* v. *LeBlanc, supra,* or by injunction against execution, that the corporation may have time to purchase or condemn. *Pittsburg & L. E. Ry. Co.* v. *Bruce* (1882) 102 Pa. 23. But when the landowner allows public works to be built and operated on his land he is estopped from maintaining ejectment and relegated to an action for compensation, *Cowan* v. *Southern Ry. Co.* (1897) 118 Ala. 554, and this is true whether assent be given before or after entry. *C. B. & Q. R. R. Co.* v. *Envlehart* (1899) 57 Neb. 444. Mere acquiescence has been held to estop, *Louisville, New Albany & Chi. Ry. Co.* v. *Berkey* (1893) 136 Ind. 591, but see Lewis, Eminent Domain (2d Ed.) 1405. This entire class of cases can scarcely be supported on strict legal theory. It seems that they mainly depend upon considerations of public interest since the licensor retains the legal title and such licences are ordinarily revocable; *Minneapolis Western Ry. Co.* v. *Minn. & St. L. Ry. Co.* (1894) 58 Minn. 128; and since even in equity an estoppel against revoking a parol license is questioned. *St. Louis Stockyards Co.* v. *Wiggins Ferry Co.* (1885) 112 Ill. 384. This was clearly the reason for denying ejectment to a plaintiff who had let a railroad into possession under a contract to purchase upon which it subsequently defaulted. *Atlanta, Knoxville & Northern Ry.* v. *Barker* (1898) 105 Ga. 534. In the principal case there was no room for estoppel since the plaintiff was not bound by the license of the life tenant. The decision is accordingly sound. Cf. *Bradley* v. *Mo. Pac. Ry. Co.* (1886) 91 Mo. 493.

STATUTE OF FRAUDS—PAROL LAND CONTRACT—RELIEF UNDER TRUST OR MORTGAGE THEORY.—At plaintiff's request, the defendant bought certain land, either with his own money or with money loaned by him to the plaintiff, from a stranger taking the deed in his own name, but verbally promising to convey the same to the plaintiff upon payment of the purchase price, which the latter subsequently paid. *Held,* the statute of frauds did not apply, defendant being required to reconvey either as trustee or mortgagee. *Payne* v. *McClure Lodge* (Ky. 1909) 115 S. W. 764.

As the facts are not clear, the case must be considered from two standpoints. (1) Assuming that the defendant paid the consideration, relief under an express trust is impossible, Stat. of Frauds Ky. Laws 1892, § 470, and the facts constitute neither a resulting trust, no consideration moving from the plaintiff, *Botsford* v. *Burr* (1817) 2 Johns. Ch. 405, nor a constructive trust, there being an intention to create a trust relation. Pom. Eq. Juris. (2nd Ed.) § 1044. Nor can the plaintiff be termed an equitable mortgagor, and thus be allowed to enforce a parole promise. *Campbell* v. *Freeman* (1893) 99 Cal. 546. Granting that an equitable mortgage arises where the plaintiff already possessed a contract right against the vendor from whom the defendant takes title, *Stoddard* v. *Whiting* (1871) 46 N. Y. 627; *contra Micou* v. *Ashurst* (1876) 55 Ala. 607, or an equity of redemption in land already mortgaged, *Smith* v. *Cremer* (1873) 71 Ill. 185, or even an inchoate right of preemption, *Wright* v. *Shumway* (1852) 30 Fed. Cas. 18093, equity has always demanded that the mortgagor have some title or right to the land. *Caprez* v. *Towner* (1880) 96 Ill. 456. As the plaintiff possessed no such interest, the transaction would seem to be simply a parole contract for the sale of land, unenforceable under the statute. *Stephenson* v. *Thompson* (1851) 13 Ill. 186 (2) If on the contrary, the plaintiff paid the consideration with money loaned him by the defendant, a resulting trust arose in his

favor, and he also could have obtained relief as an equitable mortgagor *Campbell* v. *Freeman, supra.* On this latter interpretation of the facts, the principal case is sound.

TAXATION—EXEMPTIONS—REPEAL BY IMPLICATION.—The testator devised property in trust to establish a hospital on condition that a liberal charter be granted. The legislature created a corporation, empowered it to demand the property and exempted its property from taxation. *Held,* three justices dissenting, the subsequent Tax of 1896 which subjects to taxation, property used for other than hospital purposes did not repeal the charter of the corporation as regards the property received from the testator. *People ex rel.* v. *Raymond* (N. Y. 1909) 87 N. E. 90.

It has been settled by previous decisions that the general Tax Law of 1896 repealed by implication all prior exemptions contained in general or special acts. *People ex rel* v. *Gass* (1907) 190 N. Y. 323; *Pratt Instit.* v. *City of New York* (1905) 183 N. Y. 151; cf. *Matter of Huntington* (1901) 168 N. Y. 399. The State having reserved the right to repeal and alter the charter, the legislature had the power to withdraw its exemption; *Covington* v. *Ky.* (1899) 173 U. S. 231; *Tomlinson* v. *Jessup* (1872) 15 Wall. 454; this was conceded by the majority. Their opinion was based solely upon the ground that the court should not imply that the legislature intended to break its contract of exemption. The decision is clearly irreconcilable with the reasoning in *People ex rel* v. *Gass,* supra, though distinguishable on its facts. The revision of previous statutes by such acts as the General Tax Law, intended to create an independent system and to regulate the whole subject, displacing all prior enactments. *Matter of New York Instit.* (1890) 121 N. Y. 234; *Rex* v. *Cator* (1767) 4 Burr 2026. The courts are rigorous in the enforcement of this rule where there is a repugnancy between the revision and previous statutes. *U. S.* v. *Tynen* (1870) 11 Wall. 88. The majority gave no weight to the sound theory that the taxability of all property is presumed. *Academy of Fine Arts* v. *Phil. Co.* (1854) 22 Pa. St. 496; *Storage Battery Co.* v. *Board of Ass.* (1897) 60 N. J. L. 66. This rule is stringently enforced where statutes imposing restrictions upon the taxing power do not tend to equality of assessment. *Bank* v. *Tenn.* (1881) 104 U. S. 497. Accordingly the decision in the principal case is unfortunate because not only is it opposed to well established principles, but it seems a manifest subversion of the legislative intent.

TORTS—COMPETITION—MOTIVE AFFECTING LEGALITY.—The defendant, a banker, being actuated by ill-will towards the plaintiff, a barber, started a barber shop for the sole purpose of driving the plaintiff out of business, and regardless of profit to himself. *Held,* Jaggard, J., dissenting, the defendant was liable in tort for the loss of plaintiff's business. *Tuttle* v. *Buck* (Minn. 1909) 119 N. W. 946.

It is an often enunciated principle that an improper motive cannot make illegal an otherwise legal act. 2 Cooley, Torts (3rd Ed.) 1505. There has been more recently, however, a not altogether unopposed tendency toward recognizing a wider scope of civil duty. 8 COLUMBIA LAW REVIEW 496. Cases following this trend have sought to apply the rule that an act is unlawful if it intentionally injures another without legal justification or excuse. *Plant* v. *Woods* (1899) 176 Mass. 492; *Klingel's Pharmacy* v. *Sharp* (1906) 104 Md. 218. The motive prompting the actor has been regarded in these cases as an important factor in ascertaining the justification or excuse. 5 COLUMBIA LAW REVIEW 505; *Aikens* v. *Wisconsin* (1904) 195 U. S. 195; *Guarantee Co.* v. *Horn* (1904) 206 Ill. 103. The determination of justification being a question of public policy, courts have naturally reached varying results. *Nat'l Protective Ass'n* v. *Cummings* (1902) 170 N. Y. 315; *Pickett* v. *Walsh* (1906) 192 Mass. 572. The principal case presents a decision on a set of facts often treated by legal writers, though with varying results. J. B. Ames, 18 Harv. Law Rev. at 420; Jeremiah Smith, 20 Harv. Law Rev. at 454. The decision is in-

teresting as indicating the more advanced tendency by a square holding that the shield of competition cannot be raised to protect the defendant acting only to satisfy his own malevolent purposes. Many courts, however, would still insist that if the appearance of competition exists an investigation of motive is impolitic. See *Passaic Print Works* v. *Ely* (1900) 105 Fed. 163.

TRESPASS—REPEATED TRESPASS—INJUNCTIONS—MULTIPLICITY OF SUITS.—The defendant repeatedly entered upon the plaintiff's land and tore down his fence, and threatened to repeat the trespasess. *Held,* an injunction will lie. *Cragg* v. *Levinson* (Ill. 1908) 37 Nat. Corp. Rep. 614.

In order to prevent repeated suits at law, an injunction will, by the weight of a divided authority, lie against trespasses which the defendant threatens to repeat or continue, even when the damage from each act is slight. *Boston & Maine R. R.* v. *Sullivan* (1900) 177 Mass. 230; *Mussulman* v. *Marquis* (Ky. 1866) 1 Bush 463. In spite of the holding of some courts that equity's jurisdiction to prevent multiplicity of suits does not extend to suits for trespass between the same parties, *Jerome* v. *Ross* (N. Y. 1835) 7 Johns. Ch. 315, 335, 336; *Roebling* v. *First Nat'l Bank* (1887) 30 Fed. 744, the decision in the principal case is sustainable under the modern tendency to grant an injunction, not only in cases of strictly irreparable injury, but whenever damages would be inadequate, see 4 Pomeroy Equity (3rd Ed.) § 1357; *Ellis* v. *Wren* (1886) 84 Ky. 254, 258; cf. *Livingston* v. *Livingston* (N. Y. 1822) 6 Johns. Ch. 497, 499, as, for example, when the defendant would suffer collateral damage for which a court of law does not ordinarily compensate, *Carter et al.* v. *Warner* (Neb. 1902) 89 N. W. 747, or when the defendant is insolvent, *Mussulman* v. *Marquis, supra.* For in the principal case the disproportion between the cost of bringing successive suits and the damages recoverable would alone render the legal remedy inadequate. *Mendelson* v. *McCabe* (1904) 144 Cal. 230; *Lembeck* v. *Nye* (1890) 47 Oh. St. 336. But the argument advanced in support of similar holdings, that the damage might become literally irreparable through the ripening of the defendant's trespasses into an easement, see *McCloskey* v. *Doherty* (1895) 97 Ky. 300; *Johnson* v. *City of Rochester* (1878) 13 Hun. 285, seems fallacious, because of the plaintiff's ability to prevent such easements from arising without the interference of equity. See *Workman* v. *Curran* (1879) 89 Pa. St. 226; *McGregor* v. *Mining Co.* (1896) 14 Utah, 47, 52; Washburn, Easements, (4th Ed.) p. 182.

WATERS AND WATERCOURSES—SURFACE WATERS—OBSTRUCTION BY RAILROADS.—A railroad company by constructing an embankment for its track caused surface waters to back up on the plaintiff's land. *Held,* the company was not liable unless it could have prevented the injury without substantial inconvenience and expense. *Alabama etc. Co.* v. *Beard* (Miss. 1909) 48 So. 405.

Under the civil law rule, 4 COLUMBIA LAW REVIEW 506, which recognizes an easement of drainage over the lower tenement, a railroad company is liable for damage caused by the obstruction of defused surface waters. *Philadelphia etc. Co.* v. *Davis* (1887) 68 Md. 281. While under a strict application of the common law rule, which denies the existence of such an easement, an opposite result is reached. *C. K. etc. Co.* v. *Steck* (1893) 51 Kan. 737. Many jurisdictions, however, influenced by equitable considerations refuse to carry the common law doctrine to this extent in regard to railroad embankments, where the use of the land does not necessitate an obstruction of drainage and damage may be averted by the construction of culverts, etc. Thus, some courts, while recognizing the common law rule as generally controlling, apply the civil law broadly in such cases, *Baltimore etc. Co.* v. *Hackett* (1898) 87 Md. 224, while others do so only when a well defined drainage channel is closed. *Rowe* v. *St. Paul etc. Co.* (1889) 41 Minn. 384. Some evince a tendency to

limit each case to its express facts, *R. R. Co.* v. *Chapin* (1882) 39 Ark. 463, and to follow the maxim that one should so use his property as not to injure that of another. *Willetts* v. *C. B. etc. Co.* (1893) 88 Ia. 28. Others impose liability only where the injury could be avoided without unreasonable inconvenience and expense by the railroad. *Sinai* v. *Louisville etc. Co.* (1893) 71 Miss. 547. The principal case falls under this latter and less extreme exception to the common law doctrine.

WILLS—DETERMINATION OF CLASSES—LIFE TENANT SOLE NEXT OF KIN.—A testatrix gave a life estate to her son, but should he die without issue the estate to go to her nearest relations. The son was the sole next of kin at the death of the testatrix. *Held,* this fact was sufficient to postpone the determination of the class until the end of the life estate. *Bond* v. *Moore* (1908) 236 Ill. 576. See Notes, p. 430.